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THE FEDERAL MINISTRY OF JUSTICE'S NEW DRAFTS

FOR COPYRIGHT LAW REFORM

- FEDERAL REPUBLIC OF GERMANY -

by W. Kost

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FOREWORD

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THE FEDERAL MINISTRY OF JUSTICE'S NEW DRAFTS
FOR COPYRIGHT LAW REFORM

- FEDERAL REPUBLIC OF GERMANY -

[Following is a translation of an article by W. Kost in the German-language periodical Kartographische Nachrichten (Cartographic News), Bielefeld, Vol. 10, No. 1, January 1960, pages 11-18.]

A. Reasons for Changes in the Draft of Experts

In the spring of 1954 the Federal Ministry of Justice published the drafts of a copyright law, a law relating to societies for the exposition of rights of authors as well as a law concerning the joining of the Federal Republic of Germany in the Bern Convention -- revised in Brussels in 1948 -- as "experts' drafts on the reform on the copyright law" with the intention of bringing about a detailed public discussion so that the final drafts could be done by the government. The result was a long and critical discussion in numerous publications both in the professional and the daily press, as well as petitions to the Federal Ministry of Justice, whereby strongly divergent views became clearly evident. In the endeavor to justly reconcile these divergent views the Federal Ministry of Justice has refrained from opening up the parliamentary work on the reform by publishing the official drafts at this time; instead it has revised the first drafts in many ways, particularly by taking into consideration certain rights claimed by the authors which earlier it had partially refuted, and in part considered premature.

Involved here are:

1. The author-successor compensation, i.e., the introduction of a right to obtain compensation for the use of works that have become free of protection (gemeinfrei).
2. The right to share, i.e., the participation of artists in the increasing value of works sold.
3. The license fee, i.e., the extension of the right of the author in respect to the lending of books, periodicals, and the like, which is free under the present law.

At the end of August 1959 new drafts of a copyright law and of a law concerning societies for the use of copyrights were submitted with the request to return criticism of same to the Federal Ministry of Justice not later than March 31, 1960.

B. Provisions Important for Cartography Viewed Critically

The Ministry's draft of a copyright law and related protective rights.

The title of the law, in addition to the author's rights, mentions also related protective rights, in order to make clear that a substantial part of the law deals with these rights. The third part of the law contains special provisions for films. A fourth part deals with common provisions for authors' rights and related protective rights and the last part deals with the field of application of the law, including provisions for the transitional period and the final provisions.

1. The Copyright

Paragraph 1 defines the object of the protection by the copyright. These are, in general, works of literature, science, and art, whereby works means only individual creative products. Examples from the cartographer's point of interest are: products of a scientific or technical nature, like drawings, plans, maps, sketches and plastic representations. In contrast to the present law, the products subject to protection are not enumerated exclusively, but only examples are listed, so that in the future new types of creative products can be brought under the protection of the law. From the cartographer's point of view it must be welcomed that among the examples given are also maps and plastic representations. The present law contains no definition of the term "works" (Werke). The comment to the law states that "individual creative products" are only considered those which either by their content or form represent something novel or characteristic.

This is contrary to the petition made by the Working Group Copyright of The German Society for Cartography to the Federal Ministry of Justice [1] in which it reads that a map is considered a creative product, and therefore protected, only when it is the result of an individual, novel creation with respect to content and form; the petition requests also to write into the comment to the law that maps can never be the object of the protection of the law solely on the basis of the data contained on them, meaning their content, nor solely on the basis of form, but only when they represent an intellectually and graphically independent product of both content and form.

Concerning modification (Para 2), it reads as follows:

"Translations and other modifications of a piece of work which are the individual intellectual creation of the person producing them are treated as independent pieces of work irrespective of the copyright." This provision conforms with Art. 2, Para 2 of the Brussels text of the Bern Convention and has been taken over without changes from the draft of the experts; it also conforms with the present German law. The development concerning works by several authors

(Sammelwerke) is revealing (Para 3). The present law (Para 4 LUG and Para 6 KUG) deals with "works which consist of the separate contributions by several authors (Sammelwerke)" and vests the copyright of the whole work in the editor, or, in case he is not mentioned, in the publisher. Therefore, it does not contain general provisions concerning works consisting of separate contributions by several authors. The draft of the experts, in accordance with Art. 2, Para. 3 of the Brussels text of the Bern Convention, extended this interpolation to all works consisting of separate contributions by several authors, provided that the selection or arrangement of the works represents an individual intellectual creation.

The text of the new law goes even further and includes into the copyright collections of contributions. It reads: "Collections of works or other contributions, which by way of selection or arrangement represent an individual intellectual creation (Sammelwerke) are protected as individual products, notwithstanding the copyright on the individual pieces of the collection."

Since the publication of a work and the time of the publication are of legal significance, e.g., when maps become parts of a collection for use in churches, schools or for educational purposes, the draft of experts, contrary to the present law, contains a definition of the term "publication" and the time of publication. The first is not changed. In accordance with this, a map is considered published as soon as it is introduced to the public with the consent of the author. Under new provisions it is considered when, with the consent of the authorized person, copies in sufficient numbers have been published and have been offered to the public or otherwise been offered for sale.

Who, according to the new draft, is the owner of the copyright?

In accordance with a logical interpretation of Para 6, the originator and owner of a map is the one who created it. When individual free-lance cartographers are involved the matter is simple. But in the cartography business the situation is such that maps are published only by authorities or cartographic institutes, i.e., legal entities. But the new draft, in accordance with the draft of the experts, does not recognize a copyright of legal entity because an individual intellectual creation can only be created by an individual. But, since the maps published by legal entities do not contain any data concerning the persons who have contributed to the map and since the work contract on these individuals contains, as a matter of course, the understanding that their copyrights are vested in the publisher, Art. 9 Para 2 is applicable to these legal entities, which entitles them as editors of the maps to exercise the rights vested in the author. If no editor is listed on the map it is presumed that the publisher is authorized to exercise the rights of the author.

Para 8 is also important in the field of cartography since it deals with the rights of authors of joint contributions (verbundene Werke). This happens in the case of maps, e.g., when maps by a cartographic institute are accompanied by a descriptive text which has been written by one of several scientific cartographers. In general, their relationship will have been established by agreement. This should be done as a matter of principle in these kind of cases and in similar ones. But where this has not been done and where the author objects to the joint exploitation, Para 8 provides that each author can request from the other the consent to the publication, exploitation and revision, if the consent can reasonably be expected of him.

What is the content of the copyright?

Since the purpose of the copyright is to guarantee to the author the exploitation of his work and to protect his individual rights in the work, the draft prefaces the text with the proposition: "The copyright protects the author in the exploitation of his work and in his individual and intellectual relationship to the work." The droit moral and the right of exploitation both represent together the copyright.

The legislator considered the latter the more important from the point of view of the author. Therefore, he deals with it first. Only the right to publish is dealt with first because it is inherent in both and because in cases of unpublished works the right to exploit (with the exception of the right to make copies) can only be granted simultaneously with the right of publication.

The right of publication (Para 11) grants the author the right to determine whether and in which manner his work should be published. Furthermore, he has the right to announce the contents of his work or to describe it as long as neither the work nor the essence of its contents nor its description have been published. By inserting the word "public" -- contrary to the draft of experts, but in accordance with the present law -- it should be stressed that the non-public publication of the contents of the work, just as in the existing law, is not in violation of the copyright. In the field of cartography, more than ever, full use should be made of the right of exploitation. Particularly with respect to the newly published maps, the creative cartographer, by virtue of the exercise of this right, can obtain open-minded, factual self-criticism which will be of advantage to him in the discussions to be expected. The past has taught us not to neglect this right.

The existing copyright laws already grant the author all rights of exploitation and enumerate his individual rights except for certain limitations inherent in the nature of the copyright. However, since the development of technology has shown that it is not advantageous to enumerate the rights of exploitation in the law due to the fact that in the course of time new rights might be created,

the draft provides that the author has the exclusive right to exploit his work, including any possible future right of exploitation. The discussion concerning the draft of the experts has shown that by exercising his right of exploitation the author may exercise also those rights which the legislator did not intend to give him. Therefore, the new draft partially drops the idea of the over-all general right to exploit and distinguishes between the substantive and the non-substantive exploitation. Substantive exploitation means the exploitation of the original or the copies of the work; the various kinds of exploitation are all enumerated in Art. 12 Para 1 (rights to reproduce, to disseminate, to film, and to exhibit). Examples of the non-substantive exploitation are given in Art. 12 Para. 2, e.g., the right to broadcast, the right to lecture, give public performance and public presentation. In this instance the granting of a general right has not been changed. However, the rights of exploitation enumerated in Art. 12 Para 2 relate only to the public rendering; non-public broadcasts, lectures, presentations, and performances are free from claims under the copyright law.

Of particular interest to the cartographer are the following rights of exploitation:

a. Right to Reproduce (Para 13)

The draft defines the right in accordance with the existing law which was already contained in the draft of experts. Accordingly, the right to make copies includes the right to reproduce the work physically, irrespective of the manner of reproduction or the number of copies made. In the case of maps, reproduction may be by photostat, silk-screen, offset, etc.

b. Right to Disseminate (Para 14)

Here also the draft gives a definition in accordance with the hitherto legal interpretation. In contrast to the expert's draft, the new law extends the right of dissemination to include reproductions of the work as well as the original. Dissemination occurs when the original or reproductions of the work are offered to the public or are circulated. Contrary to the present law, the draft does not limit the right to reproduce to commercial dissemination only. Dissemination is permitted when the reproductions are circulated with the consent of the author within the limits of the law. The dissemination of official and non-official maps is done mostly by the book trade. For the dissemination of official maps, the Minister of the Interior issued through the so-called map delivery decree -- decree of the Minister of the Interior of May 31, 1941 - VIa 9224 II/40 - 6860b -- uniform rules for the whole territory of the Reich. Unfortunately, this uniformity is not yet in existence again today. Efforts in that direction should be strongly supported.

c. Right to Broadcast (Para 17)

In the existing copyright laws there were no provisions governing broadcasting. There is, however, no doubt that a new species of broadcasting -- television -- will become in the future an outstanding means for the reproduction of new maps, atlases, etc. Therefore, the right to broadcast is of extraordinary significance for the creative cartographer.

Of all rights to exploit, the right of the author to revise and change his work (Para 19) as well as the right of free use of the work (Para 20) are of special significance for the cartographer.

It has been stated in Para 2 that revisions of a work, which are the individual intellectual creations of the person doing the work, are protected as individual products, irrespective of the copyright on the work itself. This means that the revision by itself is "free," but not its publication and use, which requires consent of the author of the original (Art. 19 Para 1). The drafts of the experts provided only for "consent" of the author; by the use of the word "consent" it should be made plain that consent obtained after dissemination is not sufficient.

The author of a map must realize that the law means by revision of a map a procedure which retains the essential features of the original. Even if such revision is an individual intellectual creation, the identity of the original remains untouched. Consequently, to him, the reproduction of the revision of the map is at the same time a reproduction of the original. The modification of a map (Art. 19 Para 2) is the effort of a cartographer to publish a map as his own piece of work and -- in contrast to a revision -- not merely to revise the original. The comment to the draft distinguishes two different cases of modifications of which the cartographer must take notice.

In the first instance, it should be considered a case of camouflaged plagiarism when someone uses another's map as his own, makes use of essential features, but makes an effort to camouflage this in order to publish the map as his own. In the second instance, someone else's map is used as the basis of an individual creation; however, the cartographer does not succeed in making an individual creation because he cannot dissociate himself sufficiently from his model.

In both of these cases there are no new individual maps created, but, rather, the essential features of the original maps remain intact. They are therefore subject to the copyright of the original author. The new draft distinguishes itself from the draft of the experts in that the provisions governing modifications have been added because the "re-doing" of a work, by use of its essential features, is closer to revision than to free use. Also, in the case of modifications, it no longer states "in its essential features," but only "in essential features."

The present law has already distinguished between modification of a work and its free use for a new individual creation. In accord with the draft of the experts, the new draft retains this, stressing thereby that by free use an individual work must be created. A new copyright is created for this individual work; for the publication and exploitation of which no consent of the author of the work used is needed (Art. 20).

Besides the rights of exploitation, the draft grants to the author additional rights which are of interest to the creative cartographer. They are the provisions governing the intellectual and personal interests of the author in his work as described in Art. 6bis of the Brussels version of the Bern Convention, and are expressed as follows: "Independent of his material (monetary) rights and, even after the transfer, the author, throughout his life, retains the right of his authorship and the right to oppose any disfiguration, mutilation or other modification of his work or any other encroachment upon it which could be harmful to his honor or reputation." A special sub-section "Individual author's rights" deals with the rights of the author for recognition of his authorship and with the right to prohibit misrepresentation of the work.

The author of a map will welcome greatly the right of recognition of his authorship (Art. 21). It happens only too frequently that, on copies of maps reproduced by third parties for their purposes, the name of the author or publisher is deliberately covered up or totally removed.

The protection of the author against mutilations of his work (Art. 22) secures for the author of a map the right to prohibit a mutilation or any other encroachment upon his work which might be harmful to his stature or reputation. The provision is of great significance concerning the not always factual representation of conditions on political maps which are often subjected to censorship.

For the legal practice in the field of copyright law it is important that the copyright not be transferable, neither whole or in parts (for example, the right of exploitation). Since in most instances the author cannot make use of his work himself, he will grant user rights to third persons. The granting of a right to use, however, is considered merely a license.

The right to use (exploit) may be granted as a simple or an exclusive right and is limited to the kinds of uses known at the time of the granting of the right in order to give the author the opportunity to make new determinations when new kinds of use come into question. It is also possible to limit the right of use as to space, time, or object. It is important for the cartographer that the owner of a right to use is not entitled to change the title or author's name unless such a right has been granted specifically in the licensing agreement. The author has the exclusive right to make changes. Permitted are only such changes for which the author

cannot reasonably (Art. 34 Para 2) deny consent. In cases of maps, this may be the one-color reproduction instead of multicolor, or a reduction in the scale of the map.

The right to use (exploit) is subject to certain limitations in the interest of the public. In this respect, the draft follows the existing law, but, considering the changed conditions, partially narrows the limits of the copyright and partially extends them from the existing copyright provisions. Here, modern technology, by development of new reproduction possibilities, has made new limitations necessary.

Among these limitations of the right of exploitation, the cartographer will be particularly interested in the provisions concerning the reproduction of single copies and source bibliography.

For legal purposes and for purposes of public safety, anyone may, for example, have single copies of a map made for use before a court, an arbitration authority or any other authority without requiring the consent of the author.

The right to make copies for personal use has been dealt with especially (Para 50). The new draft retains the customary term "personal use," but, without further explanation uses also the term "other personal use," which means primarily the commercial use, but also use by authorities, public libraries, etc. For personal use it is permissible, for example, to make single reproductions, but reproduction for "other" use depends upon the payment of a reasonable license fee to the author. This does not apply in case the reproductions are used by authorities within their operation, or by public libraries or scientific institutes themselves or made for their use upon their request.

In case of maps, copying by means of modern photocopy comes frequently into question. Copies made in this manner must not be used at a later date for dissemination, nor public presentation (lectures, performances, presentations, broadcasts) [2], [3].

Following the existing law Art. 60 provides for cases of free use when there is an obligation to list the source under all circumstances, and, when such obligation exists, only if customary business practice requires it. In case of maps and atlases, it is often very difficult to list all sources used. In cases of maps, it has been considered a practical solution to list only the main sources and to limit the listing obligation to ten (10). In case of atlases, it is recommended to list sources in a special annex.

The provisions of the draft concerning duration of the copyright provide that, in accordance with the existing law and Art. 7 Para 1 of the Brussels Convention as well as most foreign laws, the copyright shall cease fifty (50) years after the death of the author. These provisions do not do justice in the case of a map requiring constant correction and addition because the geographic situation continually changes. It must be pointed out, however, that individual changes which leave the map essentially as it is should not

be considered here. In case of correction the situation is quite different. A remark in the comment to the law to the effect that, in the case of maps, a period of protection beginning with the end of the year marked on the map as the year of publication, revision or correction, seems still to be necessary.

There are new provisions concerning a new duty to pay license fees for the use of works which have become free (become public), the so-called "author's successor license (cultural fee, domain public payant). This fee shall be used for the support and maintenance of living authors as spiritual (intellectual) heirs to the former generation of authors. The provisions contained in Para 69-74 must be considered as proposals for the enactment of the new law. It will depend upon future discussion whether these provisions will become part of the official draft of the new copyright law.

2. Related Protection Rights

"Related protection rights" are rights which do not protect those creative works protected by the copyright law, but creations of a different kind which, however, are similar to the creative effort of the author or which come into existence in connection with the works of authors. There is the protection of the editions of foreign works and texts, for example, of certain scientific works and texts (old manuscripts, inscriptions, etc.) (Art. 75), protection of posthumous works (Art. 76), protection of photographs (Art. 77-80), protection of practicing artists (Art. 81-89), protection of manufacturers of sound "carriers" (Art. 90-91), and the protection of the broadcasting enterprise (Art. 92).

It is of particular interest to the cartographer that the products of photography (photographs) are not listed as examples of those rights protected by the copyright law. The reason is that these are considered artistic-technical products, and, in exceptional cases, considered individual creation. Since it is difficult to distinguish between photographic creations and photographs, the professional advisory Minister decided to consider both the same from the legal point of view and to grant to photography protection -- equal and largely analogous to that of the copyright.

3. Provisions Covering Copyright and Related Rights Granting Protection

The civil and criminal provisions dealt with here -- in accordance with the draft of experts -- concern violations of the copyright and of related rights granting protection as well as their culpability. As in the patent law, there is in copyright law a need to consolidate jurisdiction. Therefore, the draft provides for authorization by the Laender governments to grant formal jurisdiction to District Courts (Landgerichte) and Local Courts (Amtsgerichte) of copyright cases belonging to different jurisdictions, provided that this is in the interest of the administration of justice.

Art. 126 of the draft of experts contained an authorization for the Laender government to establish, within the field of copyright law, boards of experts (Sachverstaendigen Kammern) whose function it should be to render expert opinions for courts and prosecuting attorneys in copyright questions. This provision has been omitted from the new drafts because, in the opinion of the professional advisory Minister, there is an account of abundant litigation in the matter of copyright advice from a board of experts, and because the consideration of copyright cases in a few District and Local Courts will without doubt increase the experience of the judges in the subject matter. The omission to establish boards of experts may be justified from the general point of view and maybe also from the cartographer's point of view because, so far, only little litigation in cartographic matters has taken place, and, therefore, decisions by the highest courts are rare. Since it can be assumed that, also in the future, litigation in the field of cartography will be limited, there is even greater demand to appoint in such cases only experts which have full knowledge of copyright laws and are well acquainted with cartographic practice.

4. Area of Applicability of the Law

Protection by the copyright law is enjoyed by all works whose authors are German citizens, irrespective of whether and where the works have been published. In cases of co-authors, it is sufficient that one author be a German citizen. Works by authors who do not possess German citizenship, but are considered German within the meaning of the Constitution (Grundgesetz) are protected as if they were German citizens. Other provisions deal with the legal protection accorded works published within the coverage of the law to authors who are foreign citizens (Art. 123), to works published outside the coverage of the law to foreign citizens (Art. 124), and to stateless authors (Art. 125). The protection of works of foreign citizens and stateless persons results in the first place from treaties, particularly the Bern Convention of the Brussels version of 1948 and of the World Copyright Treaty of September 6, 1952, ratified by the Federal Republic of Germany February 24, 1955.

Concerning the related rights governing protection, the provisions granting copyright protection are in most cases applicable on account of their similarity. The insignificant differences do not require discussion here.

The draft by the Ministry of a law concerning exploitation (user) societies in the copyright field.

Exploitation societies are enterprises which exploit as trustees the copyright and other related rights of protection for the joint benefit of a great number of claimants. The origin is closely related to the copyright law. It began when the author,

besides the right of reproduction and dissemination, was granted additional profitable rights by the copyright laws and was in no position to supervise their exploitation personally. Since, also, the users were not in a position to identify the individual authors and enter into agreement with them about the exploitation, this state of affairs resulted in a considerable handicap for the dissemination of works protected by the copyright. This led to the formation of large organizations which contacted the individual authors or claimants, supervised the rights of exploitation and administered the fee collection agreed upon. France was the first country which, in the middle of the last century, witnessed the formation of an exploitation society, the Société des Auteurs, Compositeurs et Editeurs de Musique. Today, societies exist in more than 30 States.

In Germany, the first exploitation society was the Gesellschaft deutscher Tonsetzer (GDT), founded 1903, which dealt foremost with the exploitation of musical rights of performance. At the present time, there are a number of exploitation societies. Among them the GEMA, limited in operation to rights of composers and text-writers (lyricists), is one of the best known.

The large-scale dissemination of works of literature and art in all countries of the world caused authors to observe their rights also abroad. The exploitation societies existing in the various countries met this need by signing mutual agreements and balancing the fees collected. These societies are organized on an international basis in a holding organization. It is the Confédération Internationale des Sociétés d'Auteurs et Compositeurs (CISAC) located in Paris. This organization refrains from exercising any influence upon the internal management of the individual national societies.

The exclusive right of the author to exploit his work gives him a legally protected position of monopoly. By joining an exploitation society and transferring to them their copyrights, the authors obtain an even stronger position of monopoly. No matter how advantageous such a position of monopoly may be for author and user, it also has its drawbacks. The great power may be misused. Such possibilities lie in the refusal to safeguard the rights of individual authors or holders of related rights, or by claiming too high a percentage from the users. A further source of danger lies in the trusteeship position of the societies themselves.

Therefore, the new draft, in accordance with the draft of experts, retains the legal limitations of the rights and duties of exploitation societies, foremost being the planned State supervision over these societies, but makes in certain parts considerable changes in the proposals made in the draft of experts. One of the most important changes is the renunciation of the legal monopoly and the hereby induced control and limitation of the management of the societies. Furthermore, a provision draws a line with respect to the law concerning limitations of competition. No details will be given as to individual provisions of the law concerning the establishment of exploitation societies.

This author does not know if the exploitation societies have been active in cartography. Our institutes which sell their map products not only domestically but also abroad will certainly orient themselves towards better economic possibilities.

C. Final Observations

The German Society for Cartography petitioned the Federal Ministry of Justice for sufficient protection in the new copyright law [1]. After the new drafts of the law have been published, it will be necessary to request the Federal Ministry to consider the cartographic interests in the comments to the draft of the law by adding to the examples in Arts. 19 and 20 such other examples which clearly indicate the problems of cartography in the copyright field. This applies particularly to the revision of a map and its free use for an independent individual creation. Concerning the concept "beginning of the protection period in the case of maps," a short reference in the comment to the law would be only of little difficulty to the legislator, but of great advantage to those engaged in cartography.

Literature

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